No. 47900-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SCHNITZER WEST, LLC, a Washington limited liability company,

Respondent,

v.

CITY OF PUYALLUP, a Washington municipal corporation,

Appellant.

RESPONDENT'S REPLY BRIEF

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I. INTRODUCTION

The Puyallup City Council adopted Ordinance 3067 to change the development standards on three parcels of property held under common ownership ("Property") in order to prevent a specific development proposal by Schnitzer West ("Schnitzer"). The Council adopted Ordinance 3067 under the guise of legislative authority, but the facts make clear that its action was a "land use decision" subject to exclusive review under the Land Use Petition Act ("LUPA"). The superior court considered extensive briefing and oral argument related to subject matter jurisdiction and correctly concluded that Schnitzer's claims are subject to LUPA.

The City's Opening Brief focuses almost exclusively on the jurisdictional issue, largely ignoring (and in some cases blatantly mischaracterizing) the facts of this case. The City's reluctance to focus on the facts is understandable, but its attempt to distort the factual record is outrageous.

The City wants the Growth Board Management Hearings Board ("Growth Board"), as opposed to the courts, to consider this appeal because the Growth Board affords considerable discretion to local legislative bodies when they act in a legislative capacity. But no deference is due where, as here, the City Council rezoned a specific tract of property for a discriminatory purpose. The City Council's action was a

quasi-judicial decision subject to review under LUPA, and the City cannot change that fact by manipulating the facts in the record. The Court of Appeals should uphold the trial court's ruling and affirm the invalidation of Ordinance 3067.

II. ARGUMENT

A. The City's Opening Brief mischaracterizes the facts of this case.

In an effort to legitimize the City Council's actions, the City claims that (1) the original Shaw Pioneer Overlay was always intended to encompass industrially-zoned land, such as the Property; (2) no project-specific or site-specific land use application was pending on the Property when the legislative process for Ordinance 3067 was initiated; (3) Ordinance 3067 did not change the underlying zoning of the Property; and (4) Ordinance 3067 was an area-wide rezone that affected more than just the Property, *i.e*, the three-parcel Van Lierop tract. None of these assertions is true.

1. The original Shaw Pioneer Overlay was intended to apply only to commercially-zoned properties.

The City claims that "the City had long anticipated expansion of the Shaw Pioneer Overlay to encompass the Van Lierop property when the area was ultimately annexed." City's Opening Brief at 6. That is not the case.

In 2009, the City adopted the original Shaw Pioneer Overlay ("SPO"), which applied only to *commercially-zoned* properties. By its clear terms, the SPO applied to "specific parcels zoned Business Commercial and General Commercial on the south side of East Pioneer in the vicinity of Shaw Road." CP 102; CP 116. It did not apply to any industrially-zoned property. CP 103.

When the original SPO was adopted, the City Council did express its intent to eventually expand the SPO zone "to address areas on the north side of East Pioneer upon annexation of said areas." CP 103. By "areas on the north side of East Pioneer," the Council meant the *commercially-zoned* areas that adjoin East Pioneer. *See* CP 120. The Council did not intend for the SPO to leapfrog over the existing commercially-zoned properties adjacent to East Pioneer and land solely on the ML, industrially-zoned Property to the north.

This fact is affirmed by the March 5, 2014 Staff Report to the City Planning Commission on the proposed SPO expansion. CP 115 – 120. The Staff Report notes that it would be inappropriate to apply the original SPO to industrially-zoned properties in the Shaw/Pioneer area, "given that the ML zone often accommodates a type and scale of industrial use not anticipated in the CG or CB zones." CP 119. In addition, the City's Opening Brief concedes that "the current SPO is crafted to address commercial projects which are generally different from the larger-scale

industrial uses and related site features typically accommodated in the ML zone." City's Opening Brief at 7, *citing* CP 126. The original SPO was never intended to apply to industrially-zoned properties, and any assertion to the contrary is false.

2. Ordinance 3067 was adopted in direct response to Schnitzer's specific development proposal.

Second, the City asserts that "no project-specific or site-specific land use development application applications were pending for any of the properties within the ML-SPO overlay zone at the time the legislative proves [sic] for Ordinance No. 3067 was initiated," and that the Ordinance was never intended to be applied to the Property. City's Opening Brief at 6 and 8. These statements are patently absurd. The record is replete with evidence that the Council's sole motivation in adopting Ordinance 3067 was to stop Schnitzer's proposed project. Indeed, several Council members explicitly expressed that goal during the public hearings leading to the adoption of Ordinance 3067.

Schnitzer's specific development proposal on the Property was the primary focus of the City Council's January 7, 2014 hearing on the development moratorium, which was the same day Schnitzer submitted a short plat application for its proposed development on the Property. The timing was not a coincidence. The January 7 hearing concluded with one of the Council members urging the other members to "do[] this now

before the sale [to Schnitzer] closes." CP 458, 462, TR 56:11. Another Council member cited "major, major concern" about "large-scale development, warehouse development" on the Property. CP 460, TR 52: 8-11. Another noted that "Schnitzer West . . . is proposing a 470,000 sq. ft. warehouse on this property, and which is a huge box, basically. And that's precisely the type of development that raises the concerns." CP 461, TR 55:12-16.

The Council's intense, negative focus on the development proposal for the Property continued up until the adoption of Ordinance 3067, which ultimately rezoned only the Property, and no other property in the City. CP 124-129. Ordinance 3067 was adopted in direct response to Schnitzer's development proposal.

3. Ordinance 3067 drastically changed the zoning standards that apply to the Property.

Third, the City claims that Ordinance 3067 "does not purport to alter the underlying zone designation of any parcel . . ." City's Opening Brief at 20. Again, the City is mischaracterizing the facts in order to support its strained jurisdictional argument. The fact that Ordinance 3067 left the Property's ML zoning intact is a distinction without a difference. In reality, the Ordinance drastically downzones the Property by imposing a 125,000 sq. ft. maximum building size restriction. CP 203. The underlying ML zoning designation has no maximum building size

restriction, nor does any other industrial zone in the City.

The superior court appropriately rejected the City's argument on this point below, concluding that "the fact that the zoning classification itself, ML, did not change as a result of the Ordinance does not change the analysis, as the Ordinance creates an overlay which significantly reduces the type of development that can take place on that particular ML-zoned property and that reduction does not apply to any other similarly ML-zoned property within the City . . ." CP 679. The City's choice to retain the ML zoning label is immaterial; Ordinance 3067 substantially altered the underlying zoning standards, and in so doing, unquestionably downzoned the Property, rendering its development economically infeasible.

4. Ordinance 3067 applies solely to the Property.

Finally, the City repeatedly asserts that Ordinance 3067 was a legislative, area-wide rezone that applies broadly to "all property within the ML-SPO zone." City's Opening Brief at 6. In fact, *the only property in the new ML-SPO zone is the specific three-parcel tract that Schnitzer has proposed for industrial development*. There was nothing "area-wide" or "broadly applicable" about the Council's action. The Ordinance applies only to three parcels held under common ownership and proposed for a coordinated development. The City's misrepresentation of the factual record to support its jurisdictional argument must be rejected.

B. This Court has subject matter jurisdiction over Ordinance 3067.

1. The Ordinance is a "land use decision" subject to exclusive review under LUPA.

LUPA grants the superior court exclusive jurisdiction to review local land use decisions, with certain limited exceptions. RCW 36.70C.030. A "land use decision" is "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals." RCW 36.70C.020 (2). The definition of "land use decision" includes "an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding . . . applications for legislative approvals such as area-wide rezones." RCW 36.70C.020 (2).

The Ordinance is a final land use decision as defined in RCW 36.70C.020(2)(a). The decision was made by the City Council, the body with the highest level of decision-making authority in the City. Puyallup Municipal Code ("PMC") 1.10.010. In addition, it was a "final" determination because there is no administrative appeal right to a City Council decision. PMC 20.10.035; RCW 36.70C.020. Finally, because the Ordinance effectuated a site-specific rezone authorized by the City's comprehensive plan, it is by definition a "land use decision" under RCW 36.70C.020(a) that is subject to review under LUPA.

2. Ordinance 3067 is a site-specific rezone.

The initial issue is whether Ordinance 3067 is a site-specific rezone. The City claims that it was not a site-specific rezone because (1) Schnitzer did not submit an application for the rezone; (2) the Ordinance did not alter the underlying zoning designation of the Property; and (3) Ordinance 3067 is not "limited to a specific tract." City's Opening Brief at 20. None of these arguments are supported by facts or legal authority.

Schnitzer's Opening Brief discussed the applicable legal authority in detail, which is summarized again here. The parties agree on the definition of a site-specific rezone: it is "a change in the zone designation of a specific tract at the request of specific parties." City's Opening Brief at 19, *citing Kittitas County v. Kittitas County Conservation Coalition,* 176 Wn. App. 38, 50, 308 .3d 745 (2013); *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). The Council's action here falls squarely within that definition.

In this case, the rezone was initiated by the City Council, not a private property owner. Schnitzer did not file an application to downzone its own Property. That would be nonsensical. But the fact that the Council initiated this rezone has no bearing on whether it met the definition of a site-specific rezone. PMC 20.11.005 specifically provides that "persons or agencies, including owners, bona fide agents, the commission and the council" can initiate site-specific rezones. When a

council initiates a site-specific rezone pursuant to its own code, it does not somehow transform a quasi-judicial action into a legislative one.

The second issue is whether the Ordinance changed the zoning on the Property. The City argues that because the Ordinance adopted an "overlay," but did not change the underlying ML zoning designation, the Ordinance merely supplemented, but did not change, the Property zoning. As addressed previously, this is a distinction without a difference. Before the Ordinance was adopted, the Property's ML zoning would permit development of a 470,000 sq. ft. warehouse facility. The Ordinance adopts a new "overlay" which imposes a 125,000 sq. ft. building limitation, dramatically altering the underlying ML zone designation and rendering development of the Property infeasible. CP 203.

The superior court dismissed the City's argument out of hand, noting in its letter ruling that "the fact that the zoning classification itself, ML, did not change as a result of the Ordinance does not change the analysis." CP 679. The City's choice to retain the ML zoning label does not change the fact that the Ordinance altered the underlying zoning standards.

Finally, the Ordinance is site-specific. The Ordinance was limited to a specific tract. The fact that the tract encompasses over 20 acres is irrelevant. It is held under common ownership and proposed for one coordinated development. The Ordinance did not apply to all ML zoning

in the City; it did not even apply throughout the SPO Zone. Instead, the new ML-SPO standards adopted in the Ordinance apply *only to the three parcels owned by Schnitzer and proposed for coordinated development.* These regulations apply nowhere else in the City. The superior court understood these facts and correctly concluded that the Ordinance "was clearly directed at a specific site." CP 677. The facts and the law compel the conclusion that Ordinance 3067 is a site-specific rezone.

The reverse is also true. Ordinance 3067 does not meet the definition of an area-wide rezone. The City notes that "a text amendment is of area-wide significance if it affects an entire zoning classification and 'not just a specific tract.'" City's Opening Brief at 20, *citing Citizens Alliance to Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356-66, 894 P.2d 1300(1995)(citations omitted). The City is citing the correct legal standard but incorrectly applying it to the facts of this case. Several courts have addressed the distinction between site-specific rezones and text amendments that modify a zoning ordinance, holding that site-specific rezones occur when there are "specific parties requesting a classification change for a specific tract." *Raynes v. City of Leavenworth,* 118 Wn.2d 237, 248, 821 P.2d 1204 (1992), *citing* R. Settle, *Washington Land Use and Environmental Law and Practice* § 2.11 (1983). That is precisely what occurred here.

In contrast, when a city council amends the text of the City's zoning code in a way that affects *all* the property classified in that zone, it is a text amendment subject to Growth Board review. *Raynes*, 118 Wn.2d at 248 (a text amendment constituted an area-wide rezone when it applied equally to all properties in a zoning designation and was enacted to benefit the entire City, not just specific property owners). Ordinance 3067 applied to only one tract—the Property. It was not an area-wide rezone.

3. The Ordinance is a site-specific rezone authorized by the City's Comprehensive Plan, so it is a "project permit application" subject to review under LUPA.

The fact that the Ordinance meets the definition of a site-specific rezone is not dispositive. There is one remaining jurisdictional test: if a site-specific rezone is authorized by a comprehensive plan, it is a project permit application reviewable under LUPA. If a site-specific rezone is adopted concurrently with a comprehensive plan amendment, it is a legislative action subject to review by the Growth Boards. *See Spokane County v. Eastern Washington Growth Management Hearings Board,* 176 Wn. App. 555, 309 P.3d 673 (2013), *review denied*, 179 Wn. 2d 1015 (2014) (Spokane County II); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 50, 308 P.3d 745 (2013); *Feil v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 367, 259 P.3d 227 (2011); *Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883 (2005), *affirmed by, Woods, supra*, 162 Wn.2d 597.

The *Woods* court articulated this test:

> A site-specific rezone authorized by a comprehensive plan is a project permit application. RCW 36.70B.020(4). Consequently, the GMHB does not have jurisdiction to hear a challenge to a site-specific rezone, even if the rezone is adopted as a county ordinance. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 169, 179, 4 P.3d 123 (2000). *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).

Woods at 580-81. *Woods* and its progeny are clear. A site-specific rezone that is not adopted in conjunction with a comprehensive plan amendment is subject to LUPA. The Supreme Court has affirmed this distinction on appeal. *See Woods, supra*, 162 Wn.2d at 612 ("a site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of chapter 36.70B RCW").

It is undisputed that the City did not amend its comprehensive plan when it adopted the Ordinance. In fact, the recitals adopted with Ordinance 3067 specifically state that the Ordinance is consistent with and "supported by policies within the Comprehensive Plan Community Character Element . . ." Finally, the City concedes on page 39 of its Opening Brief that "Ordinance 3067 is consistent with the Comprehensive Plan." This fact is dispositive on the jurisdictional issue.[1]

[1] The City's claim that Schnitzer's decision to file a Growth Board appeal simultaneously with its LUPA appeal is somehow a concession of Growth Board jurisdiction is ridiculous. When there is any question about jurisdiction in a land use matter, it is prudent to file a claim in every possible forum in order to preserve all rights of appeal and safeguard against statute of limitations issues. No court would treat such action as a concession of jurisdiction.

The City dismisses *Woods* and its progeny in one short paragraph on page 22 of its Opening Brief, arguing that these cases are inapplicable because the site-specific rezones in those cases were initiated by private property owners instead of the City Council. The City is grasping at straws. The City can cite no authority for the proposition that a site-specific rezone that is initiated by a legislative body is somehow transformed into a legislative decision. Arguments unsupported by case law must be disregarded by this Court.

Finally, the City continues to cite *Bridgeport Community Association, et. al., v. City of Lakewood*, a 2004 Growth Board case, as if it were helpful to its claims. CPSGMHB Case No. 04-3-0003 (Final Decision and Order, July 14, 2004). The City first identified the *Bridgeport* at the LUPA hearing, after failing to identify it in its briefing. The superior court could have ignored this case, but in an abundance of caution, the court asked for additional briefing on *Bridgeport* before it rendered its decision. Ultimately, the court correctly concluded that *Bridgeport* provided no support for the City's jurisdictional claims.

In *Bridgeport*, the Growth Board reviewed the City of Lakewood's adoption of an ordinance that amended the City's comprehensive plan land use map and zoning designations, as well as several comprehensive plan policies, to allow retail commercial development in the City. Intervenor Wal-Mart challenged the Growth Board's jurisdiction, arguing that

because the comprehensive plan map amendment affected only one parcel, it was a quasi-judicial action subject to review under LUPA. The Growth Board rejected that argument, holding that "by bundling the rezoning components (map and text) together with the comprehensive plan components (significantly, plan amendments upon which those rezoning actions are dependent), the City has made the entire package of amendments legislative rather than quasi-judicial." *Bridgeport*, FDO at 14.

Bridgeport, therefore, addressed an ordinance that amended the City's zoning map *and* comprehensive plan. This significant fact—which is not acknowledged in the City's brief—distinguishes *Bridgeport* from this case, which does not involve a comprehensive plan amendment. Because the ordinance at issue in *Bridgeport* amended the City's comprehensive plan, the Growth Board correctly deemed it legislative. This is consistent with the GMA, LUPA, relevant court decisions, and Schnitzer's arguments throughout this appeal. *See Spokane County,* 179 Wn. 2d 1015 (2014); *Kittitas County*, 176 Wn. App. 38; *Feil*, 172 Wn.2d 367; *Woods*, 162 Wn.2d 597 (2007). *Bridgeport* supports Schnitzer's position that the Ordinance was a site-specific rezone subject to LUPA.

C. In adopting the Ordinance, the City Council failed to follow specific City Code and state law requirements for adopting site-specific rezones in violation of RCW 36.70C.130(1)(a).

The superior court concluded that the Ordinance was a land use

decision reviewable under LUPA, RCW Chapter 36.70C." CP 423. The court made this determination because the Ordinance adopted new zoning regulations authorized by the comprehensive plan that amended the City's zoning map on a specific tract of land held under common ownership. *Woods*, *supra*, 162 Wn.2d 597. As noted, a site-specific rezone is a quasi-judicial, adjudicative decision reviewable by this Court under LUPA as opposed to a legislative decision reviewed by the Growth Management Hearings Board under the GMA. This distinction is significant because it governs the procedures and substantive review criteria the City Council must employ.

Schnitzer's Opening Brief detailed the City's lack of compliance with the procedural and substantive requirements of state law and City Code when it adopted the Ordinance, including Chapter 20.90 PMC (Rezones), Chapter 20.12 PMC (Public Hearings) and Chapter 2.54 (Office of the Hearing Examiner). The City concedes that these procedures were not followed (its only defense is that the City thought it was taking legislative action when it adopted the Ordinance). This is an independent basis for invalidating Ordinance 3067.

D. The Ordinance is a discriminatory spot-zone.

In addition to the Council's failure to comply with the procedural and substantive requirements for a site-specific rezone, the Ordinance is invalid because it constitutes an illegal, discriminatory "spot zone." "Spot

zoning" is "arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land . . ." *Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969).

In *Smith*, the Washington supreme court found "a flagrant case of illegal spot zoning," when a city council adopted a zoning ordinance that (1) singled out a parcel of land within the limits of a use district for disparate treatment, and (2) benefited a few distinct property owners, as opposed to the community as a whole. These factors apply with equal force in this case. The Ordinance adopted by the City Council applied the SPO overlay to the Property, with restrictions that do not apply to the original SPO area or any other ML-zoned parcel in the City, for the purpose of preventing a specific use proposed by a specific property owner.

The City argues that an ordinance which otherwise meets the criteria outlined in *Smith* cannot be considered a spot-zone if it singles out property for the *detriment* of a specific property owner rather than a benefit. As the superior court found, there is no authority for this position. *See* CP 679 (superior court judge "could find no case law that directly limits application of the spot-zoning line of cases solely to those situations in which the alleged spot zone favors the landowner").

The issue is whether the Council singled out a particular tract of property for discriminatory treatment. That is exactly what occurred here, which constitutes a second independent ground for invalidation of the Ordinance under RCW 36.70C.130(1).

E. The Council's adoption of the Ordinance violated the Appearance of Fairness Doctrine, Chapter 42.36 RCW.

The City's sole argument on this issue is that because the Council's action was "legislative," the Appearance of Fairness doctrine in Chapter 42.36 RCW does not apply. As explained previously, the fact that the City has characterized adoption of the Ordinance as legislative does not make it so. *See North Everett Neighbor Alliance v. City of Everett*, CPSGMHB No. 08-3-0005, Order on Motions (January 26, 2009)(a council's decision to employ a quasi-judicial process, rather than a legislative one, is not determinative of whether the substantive action is a subject to GMA or a land use decision subject to LUPA).

The Ordinance was a site-specific rezone that was *not* adopted in conjunction with an amendment to the City's comprehensive plan. As such, it was a quasi-judicial action subject to the Appearance Fairness doctrine, which was violated in form and substance here. Violation of the Appearance of Doctrine provides a third independent basis for invalidating the Ordinance under RCW 36.70C.130(1)(a) and (b).

III. CONCLUSION

The Puyallup City Council adopted a discriminatory site-specific rezone under the pretense of legislative action in order to prevent Schnitzer from developing an industrial project on a tract of industrially-zoned property. The Council's action was indefensible, so the City ignores the facts and the controlling legal authority and asks this Court to adopt an absurdly narrow jurisdictional interpretation that would deprive it of jurisdiction under LUPA.

The Council's action was a site-specific rezone, and it constitutes a "land use decision" under RCW 36.70C.020(2)(a) and the controlling case law. Schnitzer has met its burden of proof to demonstrate that the Council adopted the Ordinance without engaging in required procedures, that the Ordinance is an unlawful, discriminatory spot zone, and that it was adopted in violation of the state Appearance of Fairness doctrine. This Court should affirm the superior court's ruling and invalidate the Ordinance.

DATED this 5th day of February, 2016.

Respectfully submitted,

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I, LAURA COUNLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am employed with McCullough Hill Leary, PS, attorneys for Schnitzer West, Respondent. On the date indicated below, I caused a copy of **RESPONDENT'S REPLY BRIEF** and this **PROOF OF SERVICE** to be served via electronic mail and U.S. First Class mail on the following parties:

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